Supreme Court, U.S.
FILED
JUN 26 1991
OFFICE OF THE CLERK

NO. 90-1674

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

VICTOR D. DENENBURG AND SANDRA J. DENENBURG,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

# SUPPLEMENTAL BRIEF OF THE APPELLANTS

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# SUPPLEMENTAL BRIEF OF THE APPELLANTS

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## PRELIMINARY STATEMENT

This Supplemental Brief is Appellants' response to the Fifth Circuit panel's May 20, 1991 order (hereafter referred to as the "May 20 order"), a copy of which is attached as APPENDIX G. In its five-page May 20 order the Circuit panel (asserting lack of jurisdiction) denied appellants' suggestion for reconsideration of its April 22, 1991 order denying appellants' motion for leave to file a suggestion for rehearing en banc out of time. The May 20 order was issued by the Fifth Circuit after our petition for certiorari was filed in this Court.

## APPELLANTS' TWO POINTS IN RESPONSE TO THE FIFTH CIRCUIT'S MAY 20 ORDER

In this supplemental brief appellants' two broad points -- both of which relate to the second question presented in our petition for certiorari -- are as follows:

A. The reversible error of the Fifth Circuit's summary-judgment affirmance can no longer be (if it ever was) in doubt because, in making its interpretation of certain deposition testimony, the court rejected another reasonable interpretation as not being possible, although it was at least as likely to be the intended and correct one.

B. The importance of the second question (as well as the first) presented in our petition for certiorari remains undiminished.

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### A.

### THE REVERSIBLE ERROR OF THE FIFTH CIRCUIT'S SUMMARY-JUDGMENT AFFIRMANCE CAN NO LONGER BE (IF IT EVER WAS) IN DOUBT BECAUSE, IN MAKING ITS INTERPRETATION OF CERTAIN DEPOSITION TESTIMONY, THE COURT REJECTED ANOTHER REASONABLE INTERPRETATION AS NOT BEING POSSIBLE, ALTHOUGH IT WAS AT LEAST AS LIKELY TO BE THE INTENDED AND CORRECT ONE

## Controlling point

The salient point in this main part of our supplemental brief is that, on the taxpayers' appeal from a summary judgment, the appellate court could not legally exclude (as the Fifth Circuit erroneously did) the at least equal possibility that a jury reasonably could have interpreted appellants' C.P.A.'s deposition testimony the same way that both the appellants and (apparently) the appellee have interpreted it all along. And such a jury finding could not be overturned by a court.

The May 20 order (App. G) makes clear, for the first time, that the Fifth Circuit reads the C.P.A.'s answer to a question on his deposition exclusively a certain way (as explained below). In the court's view it cannot reasonably be interpreted another way. It plainly can be, however.

Appellants' interpretation of the C.P.A.'s deposition testimony is at least as logical and likely to be correct as the Fifth Circuit's interpretation. Furthermore, appellants' interpretation has no grammatical incorrectness or structural imperfection; the circuit court's has several, as later discussed.

**The deposition testimony in question**

The testimony in question, which is the C.P.A.'s answer to a question on his deposition, was as follows, in question-and-answer form, as it appears (except for our underlining) on page 13 of the deposition of the C.P.A., Mr. Sweeney:

> Q Did you ever advise Mr. Denenburg with respect to his 1978 return that it was not necessary to file the return on time for some reason?
>
> A I am certain that I said that, and I think it was conveyed to him, that because of the substantial variation in the way the document was written

> with the way that the books were maintained at the corporation, that to file a return that was materially -- and we knew it to be incorrect -- was certainly not what we would as a firm propose to do. [Emphasis supplied.]

**How the Fifth Circuit reads the C.P.A.'s deposition testimony**

In its May 20 order (App. G) the Fifth Circuit said the C.P.A.'s answer is susceptible of only one interpretation. By that interpretation, either the second or third "that" should be disregarded as being repetitive (see p. 4, lines 5-6 of the May 20 order). The court said "the C.P.A. was actually answering in the negative" (id. at 3). And finally (id. at 4):

> the CPA's response simply cannot be construed to support counsel's contention that the CPA or his firm advised the taxpayers that . . . they need not file a return timely. [Emphasis supplied.]

For clarification, we acknowledge that there are two possible ways to interpret the first words, "I am certain that I said that."* The Fifth Circuit's way is one way. Another way (at least equally logical) is to interpret the C.P.A.'s first words "I am certain that I said that" as being a directly responsive affirmative answer to the question.

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*However, until we received the Fifth Circuit's May 20 order last month, we assumed no one disagreed with interpreting the C.P.A.'s words "I am certain that I said that" (emphasis added) to mean "yes, I said that". (An affirmative answer.) If the undersigned attorney may be permitted to speak on this point in the first person singular, it did not occur to me -- until I received the Fifth Circuit's May 20 order -- that there was an alternate interpretation on the table for consideration. This is probably because (1) I was present at the C.P.A.'s deposition, and (2) the government obviously has always concurred with our interpretation (probably because the government's trial attorney also was at the deposition). The government's contention was not that the C.P.A. didn't advise the taxpayer that it was not necessary to file timely. Rather, the government contended that such advice, admittedly given,

If the court reporter had merely put a semicolon (to indicate a pause, for example) rather than a comma after the words "I am

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cannot constitute "reasonable cause" (although, the government said, advice not to file at all can). For example, the arguments made on page 13 of the government's brief in the Fifth Circuit obviously are based on the assumption that the C.P.A. said he had advised the taxpayer that (under the uncertain circumstances) it was not necessary to file timely. Applicable portions of page 13 of the government's brief are as follows:

> Therefore, taxpayers' argument (Br. 22-23, 33, 34), that reliance on a tax professional's advice that a return need not be filed by the due date constitutes reasonable cause, is incorrect. . . . Taxpayers' argument (Br. 34) that the rule, that reliance upon professional advice that a return need not be filed, should be expansively viewed to also cover situations where a tax professional feels that it would be "reasonable and proper" (Br. 37) to disregard the filing requirements of the Code, is inconsistent with the decisions in Boyle, Jackson, and Ballard.[9/]
>
> . . . .

certain that I said that" (or if she had underlined the second "<u>that</u>" for emphasis if

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> [Footnote 9 of government brief:] Contrary to taxpayers' assertion (Br. 34-35), the District Court did not find (R. 52) that taxpayers' accountant failed to advise taxpayers that they may disregard the due dates.

Nevertheless, the Fifth Circuit, on page 2 of its May 20 order, refers to page 5 of our Motion for Leave to File a Suggestion for Rehearing En Banc Out of Time and uses the words "misrepresent the testimony of the C.P.A." in a way that is "misleading" in regard to two places where I didn't insert asterisks or dots to indicate the omission of words after the words "I am certain that I said that." However, I inserted asterisks after other quotations of these words, which the court failed to note. I set out the first part of the C.P.A.'s answer and inserted asterisks to indicate our omission of his subsequent words on pages 12 and 35 of our opening brief in the Fifth Circuit (and similarly on pages 11 and 35 in regard to the C.P.A.'s later answer to the somewhat similar question concerning the later year). The entire question and answer were set out on page 2 of Appellants' Petition for Rehearing to the Panel, and that page was attached as ADDENDUM A (and discussed in footnote 4 on page 7) of our Motion for Leave to File a Suggestion for Rehearing En Banc Out of Time

the witness had emphasized it), the Fifth Circuit's interpretation would be excluded, assuming acceptance of such punctuation. But court reporters (in this part of the country,

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(to which the panel referred). On page 7 of our petition for certiorari I again quoted the C.P.A.'s answer in full, although later on page 14 I didn't (again, not imagining there was any question as to this being the agreed and proper interpretation). On the next page the remainder (after "I am certain that I said that") of the C.P.A.'s answer is referred to with the accompanying statement that it did not detract from his first words ("I am certain that I said that"). Let me state as an officer of the Court that I had no intent to mislead anyone. The panel should have expressly assumed this, inasmuch as it was obvious. The point as to what the C.P.A. intended was not in controversy, as the government obviously interpreted his testimony the same way we did. But the Fifth Circuit, in its scholarly and for the most part carefully written January 4, 1991 opinion (reported at 920 F.2d 301), did not make clear that its interpretation of the words "I am certain that I said that" excluded the possibility of ours being another reasonable interpretation.

Later, with a chance to review and reconsider its obvious and egregious error, the circuit panel should have acknowledged it.

at least) -- as we believe this Court can take judicial notice -- generally do not use semi-colons (nor underline words).

As explained in the footnote, we did not contemplate a second possible interpretation (the Fifth Circuit's) until last month when we received the Fifth Circuit's May 20 order. (We had no reason to, since the Fifth Circuit's interpretation had not previously been suggested by the appellee or the District Court.)

The proper interpretation of a contract (or other legal instrument) is generally a question of law, and if the Fifth Circuit had been interpreting a contract it presumably could have determined, as a matter of law, which version is correct. But an appellate court cannot -- in a summary-judgment case -- choose between two plausible interpretations of <u>factual testimony</u> with finality. For such a <u>factual</u> matter is for the jury to decide.

In a summary-judgment case, where from the evidence there is a legitimate interpretation or reasonable inference favorable to the non-movant/appellant, his version must be accepted. (See the cases discussed in footnote 5 on pages 17-20 of appellants' petition for certiorari.)

Here, the appellants' interpretation is not merely possible, it is totally logical. It was uncontested by the government. It is at least as likely (we contend more likely) to be correct as the Court's version. It is the only one of the two versions that is grammatically and structurally correct (with or without the court reporter's commas). On the other hand, the Fifth Circuit's interpretation is grammatically and structurally incorrect for several reasons:

(1) For the Fifth Circuit's interpretation to be grammatically correct, there are too many "that"s (either the second or

third "that" being redundant). The Fifth Circuit does not expressly admit that appellants' interpretation is the only grammatically correct one; however, as noted above, the court acknowledged there is one "that" too many for its own interpretation to be grammatically correct. (See p. 4, lines 5-6 of its May 20 order, referring to the C.P.A.'s "repeating the word 'that' . . . .").

(2) Secondly, the circuit court's interpretation is structurally incorrect. It involves another redundancy -- a more significant one. The trouble with the Fifth Circuit's interpretation is that, just as there is one "that" too many, there is one entire clause too many. For, if the circuit court's interpretation were correct, one of the C.P.A.'s two clauses, "I am certain that I said that" and "I think it was conveyed to him", would appear redundant, in covering the

same thing. The witness probably would not have said basically the same thing twice.

(3) There might well be a third problem with the circuit court's interpretation: namely, an inconsistency between the words "I am certain" and "I think", if the two clauses quoted in the preceding paragraph both referred to the same thing.

(4) A fourth shortfall of the circuit court's interpretation is that, by it, there would be no direct answer (i.e., affirmative or negative) to a question that called for an affirmative or negative answer.

On the other hand, appellants' interpretation does not involve these or any other grammatical or structural errors. According to appellants' interpretation, the C.P.A.'s first words "I am certain that I said that" were directly responsive to the question, and answered it affirmatively.

At first glance it might appear superficially that the C.P.A.'s answer to a later question concerning the return for the subsequent year (1979) conforms with the Fifth Circuit's interpretation, since the C.P.A.'s answer does not expressly begin with a simple affirmation that he had advised delayed filing, as (according to our interpretation) his answer to the question concerning the 1978 return did. But the later question was asked somewhat differently. The later question and answer (Sweeney dep. 18-19) were as follows:

> Q Did you advise Mr. Denenburg that there was <u>some reason why</u> it was not necessary to file the 1979 income tax return on or before the due date? [Emphasis supplied.]
>
> A I know that I reiterated the same statement that I had made the prior year with the '78 return, that to file a return that was based on the documents would result in substantial income tax impact and would require amended returns for the corporation for both years, and that the only practical way to solve the matter was to get the amended

> documents. But we would not file a return unless we saw those amended documents.

Instead of asking (as the earlier question did) "Did you . . . advise Mr. Denenburg . . . that it was not necessary to [timely] file . . . for some reason" (emphasis added), the question concerning the later year focused on the reason for the advice, as distinguished from simply asking whether the advice itself had been given. Hence the C.P.A.'s answer to the later question began with his giving the reason for his advice (obviously implying that he had advised delayed filing), rather than with an affirmative (or negative) statement as to whether he had advised that it was not necessary to timely file. Certainly a reasonable inference, considering both questions and answers, is that the C.P.A. intended his answer to the later question (as to the 1979 return) to be an affirmative answer to that

question. Like many other accountants when testifying, his statement included not only the responsive answer itself but also an explanation.

## Summary of Part A

For clarification we repeat that we concede that the circuit court's interpretation is an arguably possible one. And we repeat that appellants' position is that appellants' interpretation of the C.P.A.'s words "I am certain that I said that" is a logical and reasonable interpretation which, therefore, a jury could opt for; thus, on an appeal from a summary judgment, the appellants' version must be accepted. (In its May 20 order, p. 3, the circuit panel acknowledged that if the appellants' interpretation of the C.P.A.'s words were correct, "this court might likely have ruled differently.")

But the circuit court affirmed the government's summary judgment on the basis of the circuit court's own interpretation of the C.P.A.'s deposition testimony. That second possible interpretation is one for which neither side had contended or apparently even contemplated, probably because their attorneys had heard the C.P.A.'s testimony and understood what he probably meant. Left to its own lights the Fifth Circuit made a legally indefensible decision, in absolutely excluding, as another possible interpretation, the appellants' at least equally logical interpretation of the C.P.A.'s deposition testimony.

B.

**THE IMPORTANCE OF THE SECOND QUESTION (AS WELL AS THE FIRST) PRESENTED IN OUR PETITION FOR CERTIORARI REMAINS UNDIMINISHED**

The second of the two questions presented in appellants' petition for certiorari asks --

> Whether an appellate court, in affirming a summary judgment, may refuse to accept the deposition testimony of the appellants' witness on the key question of fact.

The Fifth Circuit's holding obviously flouts a basic summary-judgment rule of law (again, see the cases discussed in footnote 5, pp. 17-20, of our petition for certiorari), that where a reasonable inference from the evidence favors the non-movants (appellants, here) it must be accepted.

## CONCLUSION

The Fifth Circuit's interpretation of the C.P.A.'s words "I am certain that I said that" is only one of two logical interpretations. The question of which interpretation was intended cannot be resolved at the appellate level against the appellants on their appeal from a summary judgment, because all reasonable inferences from the evidence must be resolved in their favor. The question of

which of the two possible meanings the C.P.A. intended must therefore be submitted to a fact-finder.

Why the Fifth Circuit would be so oblivious to what, we believe, would be obvious to 100 out of 100 other intelligent persons escapes us.

Since:

(1) the appellants' interpretation of the deposition testimony is reasonably possible and therefore a justifiable inference; and

(2) it is favorable to the taxpayers who are appealing from a summary judgment,

reversal of the Fifth Circuit's decision (improperly based on a factual finding) is automatic.

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**CERTIFICATE OF SERVICE**

I hereby certify that three copies of the foregoing Supplemental Brief of the Appellants have been served this 26th day of June, 1991, by United States Mail, postage prepaid, addressed to:

Hon. Kenneth W. Starr
Solicitor General
Tax Division
Department of Justice
P. O. Box 502
Washington, D.C. 20044

JOHN A. BAILEY

**APPENDIX G**

[FILED MAY 20, 1991]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 90-2257

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VICTOR D. DENENBURG and wife,
SANDRA J. DENENBURG,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee

---

Appeal from the United States District Court
for the Southern District of Texas

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BEFORE GARWOOD and WIENER, Circuit Judges, and VELA*, District Judge.

B Y T H E C O U R T :

IT IS ORDERED that appellants' suggestion for reconsideration of the court's previous order of April 22, 1991, denying

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*District Judge of the Southern District of Texas, sitting by designation.

appellants' motion for leave to file out of time suggestion for rehearing en banc is DENIED. Just as was the case with appellants' previous motion for leave to file a suggestion for rehearing en banc out of time, we lack jurisdiction to hear the instant motion. Henceforth the clerk of this court shall not accept any attempted filings by or on behalf of appellants in this matter.

Nonetheless, in as few words as possible, this court shall try to disabuse counsel for taxpayers of his clearly mistaken concept of what has transpired in this appeal. Possibly this third effort to do so shall have the proverbial charm.

This court has not, as counsel suggests, rejected or discredited the taxpayers' CPA's plain answer to a "key question" of this case; neither have we refused to accept such testimony. Rather, counsel has misinterpreted the court's reading

of the CPA's testimony--admittedly quite different from counsel's reading--as rejecting such testimony. This court has, however, relied heavily on the total testimony of the CPA in his affidavit and in his deposition.

Counsel continues to misinterpret the testimony of the CPA. Most telling, on page 5 of counsel's Motion for Leave to File a Suggestion for Rehearing En Banc Out of Time, he transforms--to a degree closely approaching sanctionability--the initial clause of the understandably long, disjointed and rambling answer in the CPA's deposition, into a complete sentence by replacing the initial comma with a period, omitting the required ellipsis, and closing the quotation immediately following the period. Not only is that treatment erroneous, but it is grossly misleading.

The question posed to the CPA in his deposition was, "Did you ever advise [the

taxpayer] with respect to his 1978 return that it was not necessary to file the return on time for some reason?" A person unfamiliar with the entire deposition or, for that matter, unfamiliar with the CPA's full reply to that question, would, upon reading counsel's shameless transformation of the initial clauses of the CPA's response, assume (as counsel apparently intended) that the CPA answered the question in the affirmative, without qualification. That the CPA answered affirmatively is simply not the case.

Counsel tries to influence the unfamiliar reader to view the improperly truncated clauses as a complete sentence--as though the second "that" were the object of the verb "said" and, more importantly, as an informal, conversationally shortened substitute for the noun clause ". . . that it was not necessary to file the return on time for some reason." Had the CPA's answer been as

thus misrepresented, counsel would be correct and this court might likely have ruled differently. But counsel's version is not what the CPA said.

A proper analysis of the CPA's answer reveals first that the CPA did not truly respond to the question, and second that, by being unresponsive and somewhat evasive, the CPA was actually answering in the negative. The CPA began his response with "I am certain that I said . . ." followed by "that" as the beginning of a noun clause. But, before he completed the noun clause, the CPA inserted the parenthetical, independent clause "and I think it [i.e., what he said] was conveyed to him [the taxpayer], . . ." Having thus interjected the parenthetical thought about whatever he had said having been told to the taxpayer, the CPA completed his answer by repeating the word "that" and finishing the noun phrase as follows: "because of

the substantial variation in the way the document was written with the way the books were returned at the corporation, that to file a return, that was materially--and we knew it to be incorrect--was certainly not what we would as a firm propose to do."

But when we translate the CPA's answer from "deposition-ese" and delete the independent clause, his response reads as follows:

> I am certain I said that to file a return which was materially incorrect, because of the substantial difference between the way the document was written and the way that the books were maintained at the corporation, was certainly not what we, as a firm, would propose to do.

As thus grammatically and syntactically reconstituted, the CPA's response simply cannot be construed to support counsel's contention that the CPA or his firm advised the taxpayers that, as a matter of tax law, they need not file a return timely.

Conversely, our interpretation of the CPA's answer is supported by reading it in the context of his entire deposition.

Counsel's insistence to the contrary notwithstanding, this court did apply the well recognized standard of review for summary judgment cases by viewing the summary judgment evidence in the light most favorable to the non-movant--but reading it realistically nonetheless.

We close with a caution to counsel for the taxpayers: We admire the fervor with which he has represented his client in this case and the tenacity with which he has refused to take "No" for an answer. But we suggest that henceforth counsel temper his fervor and tenacity with professional objectivity and with consent awareness of his role as an officer of this court, particularly when, in briefs and memoranda, he represents quotations as true and complete, as well as

when he characterizes the action of the court pejoratively.